Eadie Voon Architect v Stylish Houz Development Sdn Bhd (in liquidation) (Koperasi Kemas Negeri Sembilan Bhd & Ors, interveners)

HIGH COURT (KUALA LUMPUR) — APPLICATION NO WA-28PW-260–07 OF 2020
AZLAN SULAIMAN JC
21 JUNE 2022

Land Law — Indefeasibility of title and interest — Beneficial ownership of property — Liquidator applied for lands to be vested with liquidator as part of property belonging to respondent — Whether beneficial interest in lands passed to respondent — Whether liquidator bound by order — Whether respondent's title to lands was defeasible — Whether there would be unjust enrichment if liquidator's application allowed and lands were held to be property of respondent

Koperasi Kemas Negeri Sembilan Bhd ('the Koperasi') entered into a sale and purchase agreement ('the original SPA') with the respondent ('the company') to sell two parcels of land ('the lands') to the company for RM52m. Just under three weeks later, the Koperasi and the company signed a supplementary agreement ('the SPA') to reduce the sale price to RM18.8m ('the purchase price'). After deducting the deposit of RM1.8m, the balance purchase price under the SPA was RM16.92m. The Koperasi executed a valid and registrable memorandum of transfer together with all necessary documents to effect a transfer of the lands ('the transfer documents'). The transfer documents were deposited with the company's solicitors, Messrs Param Sundaram as stakeholders. The company took financing to buy the lands, the financier being Malaysia Building Society Bhd ('MBSB'). The company had applied for financing from MBSB using the original SPA ('MBSB loans'). Apart from acting as the company's solicitors and as stakeholder, Messrs Param Sundaram also acted as solicitors for MBSB. Despite the clear unambiguous provisions of the SPA and at the time when the company had only paid the deposit and nothing more, without the Koperasi's knowledge or consent, on 5 January 2016 the transfer of the lands from the Koperasi to the company was effected and a charge in favour of MBSB was registered over the titles to the lands ('MBSB's charge'). The Koperasi lodged a private caveat over the lands and demanded payment of the balance purchase price of RM16.92m, but to no avail. After a further payment of RM1m that reduced the balance purchase price to RM15.92m, the company still did not pay the full purchase price. The Koperasi was informed by MBSB that MBSB had cancelled the MBSB loans because the company had failed to complete the security documents for MBSB's loans. The Koperasi filed a suit at the Seremban High Court against

the company and MBSB. The Koperasi and MBSB recorded a penghakiman persetujuan between them to cancel MBSB's charge over the lands. The Koperasi and the company by consent recorded an order ('the first order') ie the company was to pay the balance of the balance purchase price of RM15.92m within 60 days of the first order, failing which the lands were to be re-transferred/vested back to the Koperasi. The company paid the RM1m but failed to pay the balance of RM14.92m ('the balance') within 60 days of the first order ie by 26 April 2019. The company applied for an extension of time to pay the balance ('the company's EOT application'). The Seremban High Court allowed the application making another order ('the second order') that extended the time for payment by the company of the balance of RM14.92m to 27 August 2019. When the company failed to pay the balance, the Koperasi then effected the transfer of the lands from the company back to itself. When the lands were registered back into the Koperasi's name on 8 October 2019, the company had not made any further payments to the Koperasi. Unbeknown to the Koperasi, Eadie Voon Architect as the petitioner presented a winding up petition against the company and a winding up order was made against the company. This was obviously after the first order but prior to the transfer of the lands back to the Koperasi. The company also did not notify the Koperasi of this when it filed the company's EOT application and obtained the second order. In the winding-up order, Augustine a/I TK James was appointed as the liquidator of the company. Hence, this liquidator's application for the relief, inter alia, that the lands to be vested with the liquidator as part of the property belonging to the company.

Held, dismissing the application with costs:

(1) At the time of the winding up petition and the winding up order, the company had been registered as the owner of the lands. However, the registration of the company as the owner of the lands had been effected without the Koperasi's knowledge and without the company having paid the purchase price under the SPA in full. Even though the lands were transferred from the Koperasi to the company, the beneficial interest in the lands did not pass. Since the Koperasi's beneficial interest in the lands never passed to the company, the lands did not belong to the company. Since the beneficial interest in the lands at all times remained with the Koperasi, it was not a disposal (see paras 51 & 58–59).

(2) The first order was made before the winding-up petition and the winding-up order. Thus, as the company was bound by the consent order, so was the liquidator. In the liquidator's application, the liquidator did not apply to set aside the first order or directly challenge its validity. As the transfer/vesting of the lands back into the Koperasi's name was pursuant to the terms of the first order, it was not a disposition of the company's property (see paras 66–68).

(3) Even though from 5 January 2016 to 8 October 2019 the company was registered as the owner of the lands, its title was at all times defeasible. By having failed to pay the purchase price under the SPA — in fact, having paid only the deposit when the transfer was effected — the company was never supposed to have been registered as owner of the lands. That registration was contrary to the express terms of the SPA. The transfer of the lands from the Koperasi to the company was fraudulent and dishonest. It was incredulous that the company took the position that the lands belonged to the company. The transfer of the lands from the Koperasi to the company in 2016 was also under a void instrument. The lands were not the property of the company, were not property to which the company was or appeared to be entitled, were not property belonging to the company or assets of the company. The liquidator's contention that the lands had been unlawfully, wrongfully and fraudulently transferred from the company to the Koperasi, and that transfer should be set aside/reversed was rejected. The fraud was in the company transferring the lands to itself in the first place. Therefore, the transfer/vesting of the lands in the Koperasi pursuant to the first order was valid (see paras 69, 76-78, 83–84 & 86).

(4) To hold that the lands were the company's property would result in the company being unjustly enriched at the Koperasi's expense. The liquidator would have known from the SPA, the first oreder and the second order that the company had not paid the Koperasi in full for the lands, and of the agreement between the company and the Koperasi under the first order — which was even before the winding up petition — and under the second order for the company to pay the balance first by 26 April 2019 and then by 27 August 2019 failing which the lands would be transferred/vested back in the Koperasi. He would have known that the lands did not rightfully belong to the company. He should have recognised where the fraud actually laid, and he could have re-considered the company's position on the lands and reconsidered the liquidator's application (see paras 90, 92 & 95).

[Bahasa Malaysia summary

Koperasi Kemas Negeri Sembilan Bhd ('Koperasi') memeterai perjanjian jual beli ('SPA asal') dengan responden ('syarikat') untuk menjual dua bidang tanah ('tanah') kepada syarikat untuk RM52juta. Hanya lebih kurang tiga minggu kemudian, Koperasi dan syarikat menandatangani perjanjian tambahan ('SPA') untuk mengurangkan harga jualan kepada RM18.8 juta ('harga belian'). Selepas ditolak deposit RM1.8m, baki harga belian di bawah SPA ialah RM16.92 juta. Koperasi melaksanakan memorandum pindah milik yang sah dan boleh didaftarkan bersama semua dokumen yang diperlukan untuk melaksanakan pemindahan tanah ('dokumen pemindahan'). Dokumen pemindahan telah didepositkan dengan peguam syarikat, Tetuan Param

Sundaram sebagai pemegang amanah. Syarikat itu mengambil pembiayaan untuk membeli tanah tersebut, pembiayanya ialah Malaysia Building Society Bhd ('MBSB'). Syarikat itu telah memohon pembiayaan daripada MBSB menggunakan SPA asal ('pinjaman MBSB'). Selain bertindak sebagai peguam syarikat dan sebagai pemegang amanah, Tetuan Param Sundaram juga bertindak sebagai peguam untuk MBSB. Walaupun peruntukan SPA yang jelas dan pada masa syarikat hanya membayar deposit dan tidak lebih, tanpa pengetahuan atau persetujuan Koperasi, pada 5 Januari 2016 pemindahan tanah daripada Koperasi kepada syarikat telah dilaksanakan dan satu gadaian memihak kepada MBSB telah didaftarkan ke atas hakmilik tanah-tanah ('gadaian MBSB'). Koperasi telah membuat kaveat persendirian ke atas tanah-tanah tersebut dan menuntut bayaran baki harga belian sebanyak RM16.92 juta, tetapi tidak berjaya. Selepas bayaran lanjut RM1juta yang mengurangkan harga belian baki kepada RM15.92 juta, syarikat masih tidak membayar harga belian penuh. Koperasi dimaklumkan oleh MBSB bahawa MBSB telah membatalkan pinjaman MBSB kerana syarikat itu gagal melengkapkan dokumen sekuriti untuk pinjaman MBSB. Koperasi memfailkan saman di Mahkamah Tinggi Seremban terhadap syarikat itu dan MBSB. Koperasi dan MBSB merekodkan penghakiman persetujuan antara mereka untuk membatalkan gadaian MBSB ke atas tanah tersebut. Koperasi dan syarikat dengan persetujuan merekodkan perintah ('perintah pertama') iaitu syarikat perlu membayar baki harga belian sebanyak RM15.92 juta dalam tempoh 60 hari dari perintah pertama, jika gagal tanah itu akan dipindah milik/diletakhakkan semula kepada Koperasi. Syarikat membayar RM1juta tetapi gagal membayar baki RM14.92 juta ('baki') dalam tempoh 60 hari dari perintah pertama iaitu pada 26 April 2019. Syarikat memohon lanjutan masa untuk membayar baki ('permohonan EOT syarikat'). Mahkamah Tinggi Seremban membenarkan permohonan menyebabkan satu lagi perintah ('perintah kedua') yang melanjutkan masa pembayaran oleh syarikat baki RM14.92 juta kepada 27 Ogos 2019. Apabila syarikat gagal membayar baki, Koperasi kemudiannya melaksanakan pemindahan tanah daripada syarikat itu kembali kepada dirinya sendiri. Apabila tanah itu didaftarkan semula kepada nama Koperasi pada 8 Oktober 2019, syarikat itu tidak membuat sebarang bayaran lanjut kepada Koperasi. Tanpa diketahui Koperasi, Eadie Voon Architect selaku pempetisyen membawa petisyen penggulungan terhadap syarikat itu dan perintah penggulungan dibuat terhadap syarikat itu. Ini jelas berlaku selepas perintah pertama tetapi sebelum pemindahan tanah kembali kepada Koperasi. Syarikat itu juga tidak memaklumkan perkara ini kepada Koperasi apabila memfailkan permohonan EOT syarikat dan memperoleh perintah kedua. Dalam perintah penggulungan, Augustine a/l TK James dilantik sebagai pelikuidasi syarikat. Oleh itu, permohonan pelikuidasi ini untuk relif, antara lain, bahawa tanah akan diletakhakkan kepada pelikuidasi sebagai sebahagian daripada harta kepunyaan syarikat.

Diputuskan, menolak permohonan dengan kos:

(1) Pada masa petisyen penggulungan dan perintah penggulungan, syarikat itu telah didaftarkan sebagai pemilik tanah. Walau bagaimanapun, pendaftaran syarikat sebagai pemilik tanah telah dilaksanakan tanpa pengetahuan Koperasi dan tanpa syarikat membayar harga belian di bawah SPA sepenuhnya. Walaupun tanah-tanah tersebut telah dipindah milik daripada Koperasi kepada syarikat, namun kepentingan benefisial ke atas tanah-tanah tersebut tidak berpindah. Memandangkan kepentingan benefisial Koperasi dalam tanah-tanah itu tidak pernah berpindah kepada syarikat, tanah-tanah tersebut bukan milik syarikat. Memandangkan kepentingan benefisial ke atas tanah-tanah pada setiap masa kekal dengan Koperasi, ia bukanlah pelupusan (lihat perenggan 51 & 58–59).

(2) Perintah pertama dibuat sebelum petisyen penggulungan dan perintah penggulungan. Oleh itu, kerana syarikat itu terikat dengan perintah persetujuan, begitu juga pelikuidasi. Dalam permohonan pelikuidasi, pelikuidasi tidak memohon untuk mengetepikan perintah pertama atau secara langsung mencabar kesahihannya. Memandangkan pemindahan/peletakhakan semula tanah kepada nama Koperasi adalah menurut terma perintah pertama, ia bukanlah pelupusan harta syarikat (lihat perenggan 66–68).

(3) Walaupun dari 5 Januari 2016 hingga 8 Oktober 2019 syarikat itu telah didaftarkan sebagai pemilik tanah-tanah tersebut, hak miliknya pada setiap masa boleh dicabar. Dengan gagal membayar harga belian di bawah SPA — hakikatnya, hanya membayar deposit apabila pemindahan dilakukan — syarikat itu tidak sepatutnya didaftarkan sebagai pemilik tanah. Pendaftaran itu adalah bertentangan dengan terma nyata SPA. Pemindahan tanah daripada Koperasi kepada syarikat adalah penipuan dan tidak jujur. Adalah tidak dapat dipercayai bahawa syarikat itu mengambil pendirian bahawa tanah itu adalah milik syarikat itu. Pemindahan tanah daripada Koperasi kepada syarikat pada tahun 2016 juga adalah di bawah instrumen yang tidak sah. Tanah-tanah itu bukan hak milik syarikat, bukan harta syarikat yang atau sepertinya berhak, bukan harta kepunyaan syarikat atau aset syarikat. Pendapat pelikuidasi bahawa tanah-tanah tersebut telah dipindahkan secara tidak sah, salah dan penipuan daripada syarikat kepada Koperasi, dan pemindahan itu harus diketepikan/dikembalikan telah ditolak. Penipuan adalah dalam syarikat yang memindahkan tanah kepada dirinya sendiri pada mulanya. Oleh itu, pemindahan/peletakhakan tanah-tanah dalam Koperasi menurut perintah pertama adalah sah (lihat perenggan 69, 76-78, 83, 84 & 86).

(4) Untuk memutuskan bahawa tanah itu adalah hak milik syarikat akan menyebabkan syarikat itu diperkaya secara tidak adil ke atas Koperasi. Pelikuidasi boleh mengetahui daripada SPA, perintah pertama dan

perintah kedua bahawa syarikat itu tidak membayar Koperasi sepenuhnya untuk tanah, dan perjanjian antara syarikat dan Koperasi di bawah perintah pertama — yang merupakan sebelum petisyen penggulungan — dan di bawah perintah kedua supaya syarikat membayar baki terlebih dahulu sebelum 26 April 2019 dan kemudian pada 27 Ogos 2019 jika gagal tanah-tanah itu akan dipindah milik/diletakhakkan semula kepada Koperasi. Beliau boleh mengetahui bahawa tanah itu bukan hak milik syarikat itu. Beliau sepatutnya menyedari di mana penipuan sebenarnya berlaku, dan dia boleh mempertimbangkan semula kedudukan syarikat di tanah dan mempertimbangkan semula permohonan pelikuidasi (lihat perenggan 90, 92 & 95).]

Cases referred to

Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor [2016] 5 MLJ 242, CA (folld)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)
Hor Chin Ser & Anor v Villa Genting Development Sdn Bhd (in liquidation) & Ors and other appeals [2017] 1 MLJ 311; [2017] 5 CLJ 17, CA (refd)
J Raju v Kwong Yik Bank Bhd & Anor [1994] 2 MLJ 408, SC (refd)
K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor [2005] 2 MLJ 201, FC (refd)
Lee Heng Moy & Ors v Pacific Trustees Bhd & Ors [2016] MLJU 1672; [2016] 6 CLJ 368, CA (refd)
Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Kum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)
Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713, FC (refd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23, FC (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johor & Ors [1974] 2 MLJ 45, FC (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)
Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd [2013] 3 MLJ 313, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 223, 226(4), 233, 237(3), 277(5)
Companies Act 2016 ss 472(1), (2), 475, 483, 487(3), 511
Companies Winding Up Rules 1972 r 63

A National Land Code s 340(2)(a), (b)

S Sathyananthan (Sathya Lee & Co) for the petitioner.
Pamela Ephraim (Ephraim & Assoc) for the respondent.
Himahlini Ramalingam (with Fong Ren Ming) (Himahlini & Loh) for the first intervener.
B *Khairun Nisya bt Khudri (Param Sundram) for the second intervener.*
Robert Low (with Ahmad Shahrizal and Khong Mei-Yan) (Ranjit Ooi & Robert Low) for the third intervener.
Dhanaraj (with Shobah Veera and Jeycelyn Keziah) (Hakem Arabi & Assoc) for the contributories.
C *R Santhi (Susielan & Assoc) for the supporting creditor Perunding Kos Bersatu Sdn Bhd.*

Azlan Sulaiman JC:

D

OVERVIEW

[1] The respondent, Stylish Houz Development Sdn Bhd ('the company'), was ordered wound-up on 20 August 2019 ('the winding up order') on the E petition of Eadie Voon Architect ('the petitioner'), filed on 20 June 2019 in Kuala Lumpur High Court Companies' Winding Up No WA-28NCC-591–06 of 2019 ('the winding up petition'). In the winding up order, Mr Augustine a/l TK James ('the liquidator') was appointed as the liquidator of the company.

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[2] Enclosure 2 herein is a post-winding up notice of motion dated 13 July 2020 filed by the liquidator ('the liquidator's application'), invoking ss 472(1), 472(2), 475, 483, 487(3) and 511 of the Companies Act 2016 ('the Act'). It is in respect of two parcels of land ('the lands') which were registered in the G company's name at the date of the winding up petition and the winding up order, but were transferred to Koperasi Kemas Negeri Sembilan Bhd ('the Koperasi') after that, on 8 October 2019. That transfer was done pursuant to the terms of a consent order dated 26 February 2019 ('first order') and an order dated 27 June 2019 ('second order') ('the orders') of the Seremban High Court H in a claim brought by the Koperasi against the company in respect of the lands.

[3] The real and only issue on the liquidator's application is whether the lands were the company's property when they were transferred from the company to the Koperasi.

I

SALIENT FACTS

[4] The 1st intervener, Koperasi Kemas Negeri Sembilan Bhd ('the Koperasi'), was and is now again the registered owner of the lands, respectively

held under No Hakmilik PN44069 Lot 30941 and No Hakmilik PN44070 Lot 30942, both in Mukim Setul, Daerah Seremban, Negeri Sembilan. A

[5] On 30 January 2014, the Koperasi entered into a sale and purchase agreement with the company ('the original SPA') to sell the lands to the company for RM52m ('the original purchase price'). Just under three weeks later, the Koperasi and the company signed a supplementary agreement ('the supplementary SPA') to reduce the sale price to RM18.8m ('the purchase price'). I shall refer to the original SPA and the supplementary SPA collectively as 'the SPA', as all the supplementary SPA did was reduce the original purchase price to the purchase price, with all other terms of the original SPA remaining intact and applicable. B C

[6] After deducting the deposit of RM1.8m ('the deposit'), the balance purchase price under the SPA was RM16.92m ('the balance purchase price'). D

[7] Pursuant to cl 3.1 of the SPA, simultaneously with the signing of the SPA, the Koperasi executed a valid and registrable memorandum of transfer together with all necessary documents to effect a transfer of the lands ('the transfer documents'). The transfer documents were deposited with the company's solicitors, Messrs Param Sundaram ('Messrs Param Sundaram') as stakeholders. Under the terms of the SPA, Messrs Param Sundaram was only authorized to submit the transfer documents for adjudication of the stamp duty payable on the transfer, and nothing more. E F

[8] Clause 5.1 of the SPA required the Koperasi to deliver what the SPA called 'the completion documents' to the company's solicitors as stakeholder, which included the title documents to the lands ('the title documents') and the valid and registrable memorandum of transfer. This clause further repeated the condition that the memorandum of transfer would 'be transmitted to the purchaser's solicitors for adjudication purposes only'. G

[9] Clauses 3.3 of the SPA is most crucial to this case. It expressly provided: H

> The Purchaser's Solicitors shall not present the memorandum of transfer for registration unless and until the Balance Sum together with any late payment interest (if any) is paid in accordance with Clause 4 together with interest on late payment of this Agreement and subject to clause 6.1(H).

[10] Clause 9 of the SPA further provided that, if the company failed to pay the purchase price in full to the Koperasi, the completion documents would be returned to the Koperasi 'with the vendor's interest intact.' I

[11] Clause 13 of the SPA provided that vacant possession of the lands would only be handed over by the Koperasi to the company upon full payment of the purchase price.

[12] As for the title documents to the lands ('the title documents'), the SPA provided for two scenarios for the Koperasi to hand them over. First, if the company was not obtaining any financing to assist in buying the lands, then the Koperasi would deliver them up to Messrs Param Sundaram upon full payment of the balance purchase price. That was under cl 5.1(a) of the SPA.

[13] If, however, the company was obtaining financing, then under cl 6.1(ii) of the SPA, Koperasi would deliver up the title documents to Messrs Param Sundaram for them to be released to the financier's solicitors, purely for the purpose of the transfer of the lands and the registration of the financier's charge. Even then, that was conditional upon the financier providing an undertaking to pay the loan sum to the Koperasi and Messrs Param Sundaram having received the differential sum between that loan sum and the balance purchase price from the company.

[14] The company did take financing to buy the lands, the financier being Malaysia Building Society Bhd ('MBSB'). According to the evidence, MBSB had approved to the company financing totaling a whopping RM92.4m consisting of Islamic Term Financing of RM36.4m to part-finance the purchase of the lands, and Islamic Bridging Financing of RM56m to develop the lands ('the MBSB loans'). The RM36.4m to part finance the purchase of the lands was slightly more than 190% of the purchase price. That connotes that the company had applied for financing from MBSB using the original SPA, which itself indicates a false misrepresentation to MBSB. The fact that RM36.4m was to part-finance the purchase of the lands means that MBSB believed that the purchase price of the lands was still RM52m and that MBSB expected the company to bear the remaining RM15.6m.

[15] I would also note that the documents show that, apart from acting as the company's solicitors and as stakeholder, Messrs Param Sundaram also acted as solicitors for MBSB. So, under the SPA, Messrs Param Sundaram was the company's solicitors, the stakeholder and MBSB's Solicitors. In my mind, that set the stage for the disaster that was to unfold. I strongly believe that, if not for those multiple hats that Messrs Param Sundaram wore, we would not be here today.

[16] By a letter dated 2 April 2015 ('MBSB's LOU') (which Messrs Param Sundaram forwarded to the Koperasi by letter dated 30 November 2015), MBSB provided to the Koperasi envisaged by cl 6.1(ii) of the SPA. MBSB's LOU mentioned that the undertaking was subject to, inter alia, payment by

the company, the difference between the loan sum and the purchase price, which reinforces the mistaken belief MBSB was under. On the basis of MBSB's LOU, the Koperasi released the title documents to Messrs Param Sundaram.

[17] Despite the clear unambiguous provisions of cll 3.3 and 6.1(H) of the SPA and at the time when the company had only paid the deposit and nothing more, without the Koperasi's knowledge or consent, on 5 January 2016 the transfer of the lands from the Koperasi to the company was effected. On 5 January 2016 too, a charge in favour of Malaysia Building Society Bhd ('MBSB') was registered over the titles to the lands ('MBSB's charge').

[18] On or around 31 May 2016, the Koperasi learned about the transfer of the lands to the company and MBSB's charge. The Koperasi lodged a private caveat over the lands and demanded payment of the balance purchase price of RM16.92m, but to no avail. Several discussions between the parties, further deadlines for payment, and a further payment of RM1m that reduced the balance purchase price to RM15.92m still did not see the company paying the full purchase price.

[19] By a letter dated 13 February 2018, the Koperasi's solicitors, Messrs Nor Affiza & Co. Messrs Nor Affiza & Co were informed by MBSB that MBSB had cancelled the MBSB loans because the respondent had failed to complete the security documents for MBSB's loans.

[20] It also subsequently came to light that, by a letter dated 24 August 2016, Messrs Param Sundaram was informed by MBSB that MBSB was not able to disburse the loan facility to the company 'due to non-fulfilment of conditions precedent imposed'. It essentially meant that the company had no financial assistance to complete the purchase of the lands from the Koperasi under the SPA.

[21] On 7 August 2018, the Koperasi filed Seremban High Court Civil Suit No NA-22NCvC-59–08 of 2018 against the company and MBSB ('the Seremban High Court Suit').

[22] On 2 February 2019, the Koperasi and MBSB recorded a *penghakiman persetujuan* between them to cancel MBSB's charge over the lands ('the Koperasi-MBSB consent order').

[23] On 26 February 2019, the Koperasi and the company by consent recorded the first order in the Seremban High Court Suit, in the following terms:

MAKA ADALAH DIHAKIMI DAN DIPERINTAHKAN SECARA

PERSETUJUAN seperti berikut:

1. Defendan Pertama membayar kepada Plaintif melalui peguamcara Plaintif iaitu atas nama Nor Affiza & Co jumlah wang sebanyak Ringgit Malaysia Lima Belas Juta Sembilan Ratus Dua Puluh Ribu Sahaja (RM15.92m.00) sebagai baki wang balasan belian yang dipersetujui di bawah Perjanjian Jual Beli bertarikh 30/1/2014 dan Perjanjian Tambahan bertarikh 18/2/2014 di antara Plaintif dengan Defendan Pertama (selepas ini dirujuk sebagai Perjanjian-Perjanjian tersebut).

1.1 Pembayaran pada Perenggan (1) di atas hendaklah dibuat dengan membuat bayaran pertama sebanyak Ringgit Malaysia Satu Juta Sahaja (RM1,000,000.00) dalam bentuk Deraf Bank atas nama Nor Affiza & Co dalam masa 30 hari daripada tarikh Penghakiman Persetujuan ini.

2. Baki pembayaran pada Perenggan (1) diatas sebanyak Ringgit Malaysia Empat Belas Juta Sembilan Ratus Dua Puluh Ribu Sahaja (RM14,920,000.00) hendaklah dibuat sebagai bayaran seterusnya dalam bentuk Deraf Bank atas nama Nor Affiza & Co selewat-lewatnya tidak melebihi masa 60 hari daripada tarikh Penghakiman Persetujuan ini.

2.1 Pihak-pihak bersetuju tiada apa-apa perlanjutan masa untuk pembayaran akan dibenarkan.

DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa:

3. Sekiranya Defendan Pertama gagal, enggan dan/atau ingkar untuk mematuhi Perenggan (1.1) atau (2) di atas, atas apa jua sebab sekalipun, Plaintif adalah berhak dan dianggap telah memasuki Penghakiman Persetujuan dengan Defendan Pertama berdasarkan terma-terma yang diperintahkan seperti berikut:-

3.1 Suatu perintah bahawa lanjutan daripada kemungkiran-kemungkiran Defendan Pertama terhadap Perjanjian-Perjanjian tersebut, Plaintif dengan sah menamatkan Perjanjian jual Beli dan Perjanjian Tambahan tersebut.

3.2 Suatu perintah bahawa deposit sebanyak Ringgit Malaysia Satu Juta Lapan Ratus Lapan Puluh Ribu Sahaja (RM1.8m.00) yang telah dibayar di bawah Perjanjian Jual Beli dan Perjanjian Tambahan tersebut boleh dilucuthakkan kepada Plaintif.

3.3 (i) Suatu perintah bahawa pendaftaran pindah milik hartanah-hartanah yang dipegang di bawah HS (D) 26579, PT No. 566 Mukim Setul, Daerah Seremban, Negeri Sembilan Darul Khusus yang berukuran 28.8323 hektar yang kemudiannya telah dipecah sempadan dan kini dipegang di bawah PN 44069 dan PN 44070, Lot 30941 dan Lot No. 30942, Mukim Setul, Daerah Seremban, Negeri Sembilan Darul Khusus (selepas ini dirujuk sebagai Hartanah-hartanah tersebut) kepada Defendan Pertama adalah dibatalkan dan Pendaftaran Pindahmilik Hartanah-hartanah tersebut di bawah Perserahan No. 55/2016 dibatalkan daripada Memorial dan Daftar Hakmilik.

(ii) Suatu perintah bahawa di bawah Seksyen 420 Kanun Tanah Negara 1965 Pendaftar Hakmilik dan/atau semua pihak berkuasa yang berkenaan membuat

satu memorial perletakhakan semula nama Plaintif iaitu Koperasi Kemas Negeri Sembilan Bhd (No. Daftar: 4682) sebagai pemilik berdaftar di dalam dokumen hakmilik daftaran Hartanah-hartanah tersebut.

3.4 (i) Gantirugi bagi kemungkiran Perjaniian-perjanjian tersebut oleh Defendan Pertama untuk ditaksirkan.

(ii) Suatu perintah bahawa apa-apa amaun gantirugi yang ditaksirkan ditolak dan/atau diset off daripada apa-apa baki balasan belian yang telah dibayar oleh Defendan Pertama kepada Plaintif terlebih dahulu.

3.5 Suatu perintah bahawa Defendan Pertama menyerahkan kepada Plaintif milikan kosong Hartanah-hartanah tersebut

3.6 Suatu perintah bahawa Plaintif berhak untuk menjual semula Hartanah-hartanah tersebut dan menuntut daripada Defendan Pertama apa-apa kerugian yang diakibatkan oleh penjualan semula tersebut.

3.7 Suatu perintah bahawa Defendan Pertama dihalang secara bersendirian dan/atau melalui agennya dan/atau wakilnya atau sesiapa sekalipun daripada menyempurnakan, melaksanakan dan ataupun menandatangani dokumen bagi tujuan apa-apa transaksi termasuk tetapi tidak terhad kepada Perjanjian Jual Beli, mencagar, menggadai dan/atau memindahmilik Hartanah-hartanah tersebut atau apa-apa kepentingan dalam Hartanah-hartanah tersebut kepada mana-mana pihak lain sehingga pelupusan muktamad tindakan ini dan/atau rayuan dan/atau Perintah Mahkamah selanjutnya.

3.8 Suatu perintah Kaveat Persendirian yang dimasukkan Oleh Defendan Pertama ke atas Hartanah-hartanah tersebut pada 24/2/2014 melalui Perserahan No. 1535/2014 diketepikan.

3.9 Suatu perintah untuk pemulangan Dokumen Hakmilik Asal bagi Hartanah-hartanah tersebut dalam jangkamasa 14 hari daripada tarikh kegagalan mematuhi Perenggan (1.1) atau (2) Penghakiman Persetujuan ini, sekiranya gagal satu perintah untuk Pendaftar Hakmilik Negeri, Negeri Sembilan untuk mengeluarkan Dokumen Hakmilik Asal Yang Baru kepada Plaintif dan membuat Catatan pembatalan Dokumen Hakmilik Yang Lama dalam Memorandum Daftar Hakmilik bagi Hartanah-hartanah tersebut.

3.10 Pendaftar Hakmilik dan semua pihak berkuasa yang berkenaan adalah diarahkan di bawah Seksyen 417 Kanun Tanah Negara 1965 untuk memberi kesan terhadap perintah pada Perenggan (3.3(i) dan (ii)), (3.8) dan (3.9) diatas.

3.11 Faedah pada kadar 5% setahun atas Perenggan (3.4(i)) di atas dari tarikh keingkaran Perjanjian Jual Beli tersebut pada 30/10/2016 sehingga penyelesaian penuh.

3.12 Defendan Pertama membayar kos tindakan ini sebanyak Ringgit Malaysia Satu Ratus Ribu Sahaja (RM100,000.00) kepada Plaintif melalui peguamcara Plaintif iaitu atas nama Nor Affiza & Co dalam jangka masa 14 hari daripada tarikh kegagalan mematuhi Perenggan (1. 1) atau (2) Penghakiman Persetujuan ini.

3.13 Sebarang baki balasan belian yang telah dibayar oleh Defendan Pertama

A setelah menolak apa-apa jumlah pada Perenggan (3.2) dan (3A(i)) diatas adalah dianggap telah dilucutkan kepada Plaintif dan tidak boieh dituntut oleh Defendan Pertama.

3.14 Sekiranya Defendan Pertama gagal, enggan dan/atau ingkar untuk mematuhi Perenggan (2) di atas, apa-apa pembayaran yang dibuat di bawah B Perenggan (1.1) di atas akan dilucutkan kepada Plaintif

3.15 Bahawa Plaintif adalah dengan serta meha pemilik benefisial kepada Hartanah-hartanah tersebut sekiranya Defendan Pertama gagal, enggan dan/atau ingkar untuk mematuhi terma-terma Penghakiman Persetujuan ini 3.8 seperti yang dinyatakan pada Perenggan (1.1) atau (2) dan (3) di atas.' C

[24] In simply terms, by the first order, the company was to pay the balance of the balance purchase price of RM15.92m within 60 days of the first order, failing which the lands were to be re-transferred/vested back to the Koperasi. D

[25] Though there is in the court's records a *penghakiman persetujuan terpinda* also dated 26 February 2019, that was merely to amend the penal clause to the first order without amending its terms.

E **[26]** The company paid the RM1m under para 1.1 of the first order. However, it failed to pay the balance of RM14.92m ('the balance') within 60 days of the first order (ie by 26 April 2019).

F **[27]** On 26 April 2019 the company applied for an extension of time to pay the balance ('the company's EOT application'). In prayer (1) of the company's extension application, the company sought the following order:

24. Bahawa satu kebenaran diberikan kepada Defendan untuk satu lanjutan masa selama dua bulan dari tarikh perintah disini untuk membuat pembayaran baki G Ringgit Malaysia Empat Belas Juta Sembilan Ratus Dua Puluh Ribu Sahaja (RM14,920,000.00) yang seharusnya dibayar oleh Defendan kepada Plaintif mengikut Perjanjian Persetujuan bertarikh 26 Februari 2019.

[28] Even though para 2.1 of the first order expressly stated that H 'Pihak-pihak bersetuju tiada apa-apa perlanjutan masa untuk pembayaran akan dibenarkan'and the Koperasi objected to the company's EOT application, on 27 June 2019 the Seremban High Court allowed it making the second order in the following terms:

I (1) Bahawa satu kebenaran diberikan kepada Defendan Pertama untuk satu lanjutan masa selama dua bulan dari tarikh perintah di sini untuk membuat pembayaran baki Ringgit Malaysia Empat Belas Juta Sembilan Ratus Dua Puluh Ribu Sahaja (RM14,920,000.00) yang seharusnya dibayar oleh Defendan Pertama kepada Plaintif mengikut Perjanjian Persetujuan bertarikh 26 February 2019.

(2) Kos permohonan ditanggung oleh Defendan Pertama;

(3) Defendan Pertama membayar faedah 5% atas jumlah RM14,920,000.00 dari tarikh 26 April 2019 hingga tarikh Defendan membayar RM14,920,000.00 kepada Plaintif.

[29] The second order essentially extended the time for payment by the company of the balance of RM14.92m to 27 August 2019 but without removing, superseding or amending the terms of the first order.

[30] When the company failed to pay the balance by 27 August 2019, through Messrs Noraffiza & Co, the Koperasi then effected the transfer of the lands from the company back to itself pursuant to the default terms of the first order. Messrs Nor Affiza & Co sent a letter dated 7 October 2019 to the Pengarah Tanah Dan Galian Negeri Sembilan ('PTGNS') enclosing, inter alia, the first order and the second order, and requested the PTGNS to effect the transfer/vesting of the lands back to the Koperasi as per paras 3.3(i), 3.3(ii), 3.8 and 23.9 of the first order. That was effected on 8 October 2019.

[31] When the lands were registered back into the Koperasi's name on 8 October 2019, the company had not made any further payments to the Koperasi and the balance of RM14.92m still remained. Thus, of the purchase price of RM18.8m, the company had only paid RM3.88m, which was still only approximately 20.63% of the purchase price.

[32] Unbeknown to the Koperasi, the petitioner presented the winding up petition against the respondent on 20 June 2019, and on 20 August 2019 the winding up order was made against the company. This was obviously after the first order but prior to the transfer of the lands back to the Koperasi. The company also did not notify the Koperasi of this when it filed the company's EOT application and obtained the second order.

[33] On 23 January 2020, the liquidator lodged a private caveat on the title to the lands on behalf of the company ('the company's private caveat').

[34] On 13 July 2020, the liquidator filed the liquidator's application for and on behalf of the company. In it, the company moved the court under ss 472(1), 471(2), 475, 483, 487 and 511 for the following relief:

(a) that the properties known as No Hakmilik PN 44069 Lot 30941 Mukim Setul Daerah Seremban Negeri Sembilan and No Hakmilik PN 44070 Lot 30942 Mukim Setul Daerah Seremban Negeri Sembilan (the said properties) shall be taken into custody and control of the liquidator and be vested with the liquidator as part of the property belonging to the abovenamed respondent;

(b) that the original issue document of titles of the said properties held by Messrs Param Sundram and/or any third parties shall be delivered and/or surrendered to the respondent's solicitor and/or Mr Augustine a/l TK James c/o Radiant Consultancy Asia Sdn Bhd, the Liquidator of the respondent within 14 days of this order;

(c) that the transfer pursuant to the court order dated 26 February 2019 that was registered in the Seremban Land Office on 8 October 2019 vide Presentation No 12488/2019 & Presentation No 12489/2019 in favour of Koperasi Kemas Negeri Sembilan Berhad for the said propelties ('the said Transfer') be set aside and/or be cancelled;

(d) following the setting aside and/or cancellation of the said transfer in para (c) above, Stylish Houz Development Sdn Bhd, the above named respondent be re-registered as the registered proprietor of the said properties;

(e) that the registrar of titles and/or the land administrator be directed within 30 days hereof to re-register Stylish Houz Development Sdn Bhd, the above named respondent as the registered proprietor of the said properties and to cancel the registration of Koperasi Kemas Negeri Sembilan Berhad on the issue document of titles of the said properties;

(f) that after the re-registration of Stylish Houz Development Sdn Bhd, the abovenamed respondent as the registered proprietor of the said properties, the liquidator of the respondent shall deal with the said properties as the liquidator deems appropriate which includes to sell, dispose and/or any other act that is necessary;

(g) that all current private caveats lodged on the said land shall be removed by the registrar of titles and/or the land administrator within 14 days hereof;

(h) that no parties shall be allowed to lodge a private caveat and/or to encumber the said properties until the disposal of the said properties by the liquidator of the respondent and if in the event that there are any caveats and/or liens and/or other instrument has been entered to encumber the said properties, the registrar of titles and/or the land administrator be directed within 14 days from receiving the notification from the liquidator of the respondent remove the caveat and/or lien and/or any other restraints encumbering the said properties;

(i) for costs of this application; and

(j) such other orders and or relief as this honorable court deems fit.

[35] The liquidator served the liquidator's application on:

(a) the pendaftar tanah/pentadbir tanah;

(b) the Koperasi;

(c) Messrs Param Sundaram;

(d) Messrs Nor Affiza & Co;

(e) Messrs Sathya Lee & Co, who represented the petitioner in the winding up; and

(f) Messrs Hakem Arabi & Associates, who represented the company's contributories in the winding up proceedings.

[36] At the first case management of the motion on 20 August 2020, aware of their involvement in the transfer and re-transfer of the land from Koperasi to the company and then back to the Koperasi, Nadzarin Wok Nordin, JC (as he was then), directed that the Koperasi and Messrs Param Sundaram and Messrs Nor Affiza & Co be made parties to these proceedings, and further directed that the Solicitors for the liquidator inform the PTG to appear in Court as *amicus curiae*.

[37] Save for the pendaftar tanah/pentadbir tanah, all of the other parties served with the liquidator's application filed and served affidavits and written submissions. Also weighing in with its submissions was another creditor of the company who had supported the winding up petition.

[38] I dismissed the liquidator's application on 12 May 2022 with costs.

[39] The company (through the liquidator) has appealed against my decision ('the appeal').

OBSERVATIONS ON THE LIQUIDATOR'S APPLICATION AND THE APPEAL

[40] I had mentioned to the counsel for the parties during the hearing of the liquidator's application and I do so again now, of my observation that all of the relief the liquidator sought in the liquidator's application were ancillary. There was no main relief prayed for, for example, for a declaration that the lands rightfully belonged to the company and/or for a declaration that the transfer of the lands from the company to the Koperasi was void. In prayer (1) of the liquidator's application, the liquidator goes directly to asking for an order that the lands 'be taken into custody and control of the liquidator and be vested with the liquidator as part of the property belonging to the abovenamed respondent'.

[41] However, I elected not to decide the liquidator's application on that score, more so when none of the parties, especially the Koperasi, picked up on

it. I also assumed that that was what the liquidator was seeking first and foremost, as the ancillary relief sought certainly indicated that.

[42] As for appeal, I note that the liquidator's notis rayuan dated 7 June 2022 appeals against my decision on 12 May 2022 to 'menolak permohonan pelikuidasi dan membenarkan hartanah diambil pihak responden'. I should clarify that, while I did make an order dismissing the liquidator's application, I did not make any order 'membenarkan hartanah diambil pihak responden'.

THE LIQUIDATOR'S CASE

[43] In his affidavits and submissions, the liquidator takes the following positions:

(a) as the land was registered in the company's name on the date of the winding up petition and winding up order, then it was the company's property. From the time the lands were transferred to the company in 2016, the company had the legal and beneficial interest in the lands. As liquidator, he was entitled to have control and custody of them. Consequently, the transfer of the lands to the Koperasi was a disposition of the property of the company and therefore void, under s 472(1) of the Act;

(b) the lands had been unlawfully, wrongfully and fraudulently transferred from the company to the Koperasi, and that transfer should be set aside/reversed; and

(c) the Koperasi was in reality an unsecured creditor of the company as its claim was for the balance under the SPA. Consequently, its remedy was to file a proof of debt for that balance and have the balance settled in the liquidation of the company alongside all of the company's other secured and unsecured creditors;

THE KOPERASI'S CASE

[44] The Koperasi's case is as follows:

(a) as the company had not paid the purchase price in full, the company did not possess the legal or beneficial interest in the lands, the lands were not the property of the company, and therefore the transfer of the lands to the Koperasi was neither a disposition of the company's property nor caught by s 472(1) of the Act nor void;

(b) as the transfer of the lands from the Koperasi to the company was fraudulent and/or under a void instrument, then the company's title to the lands (when the company was registered as owner), was defeasible;

(c) for the entire time that the company was registered as the owner of the lands, it held the lands on trust for the Koperasi;

(d) the lands were properly transferred/vested back to the Koperasi under the terms of the first order;

(e) the company had never challenged or applied to set aside the first order, and therefore the first order remained valid and enforceable. The liquidator's application was thus a backdoor attempt to circumvent it; and

(f) allowing the liquidator's application and holding that the lands were the property of the company would be an unjust enrichment;

THE PRINCIPAL ISSUE

[45] In my opinion, the principal issue here is whether the lands were the company's property when they were transferred from the company to the Koperasi. I believe answering that principal issue will go a long way towards dealing with the company's stands and the Koperasi's stands. So, I will deal with that principal issue first and then deal with whatever else remains.

ANALYSIS OF AND THE DECISION ON THE PRINCIPAL ISSUE

[46] As I mentioned earlier, in the liquidator's application, the Liquidator invoked ss 472(1), 472(2), 475, 483, 487(3) and 511 of the Act. It therefore may be opportune for me to set those out first. As I will be referring in my judgment to case authorities decided under the Companies Act 1965 ('the CA 1965'), I will set out the equivalent provision in CA 1965 in parentheses below those provisions of the Act invoked:

472 Avoidance of dispositions of property or certain attachment, etc.

(1) Any disposition of the property of the company, other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company made after the presentation of the winding up petition shall, unless the Court otherwise orders, be void.

(2) In subsection (1), 'exempt disposition' means a disposition made by a liquidator, or by an interim liquidator of the company in exercise of the power conferred on him under Part I of Twelfth Schedule or the rules that appointed him or an order of the Court.

(223 Avoidance of dispositions of property, etc.

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.)

475 Effect of winding up order

A An order for winding up a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and of a contributory.

(226 Copy of order to be lodged, etc.

B Effect of order

(4) An order for winding up a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and of a contributory.)

C 483 Custody and vesting of company's property

(1) Where an interim liquidator has been appointed or a winding up order has been made, the interim liquidator or liquidator shall forthwith take into his custody or under his control all the property to which the company is or appears to be entitled.

D

(2) On the application of the liquidator, the Court may order that all or any part of the property belonging to the company or held by trustees on behalf of the company shall vest in the liquidator and the property shall, subject to subsection (3), vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any E action which relates to that property or of which is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

(233 Custody and vesting of company's property

F (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

(2) The Court may, on the application of the liquidator, by order direct that G all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose H of effectually winding up the company and recovering its property.)

487 Exercise and control of liquidator's powers

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

I (237 Exercise and control of liquidator's powers

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.)

511 Delivery of property to liquidator

> The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or interim liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is prima facie entitled.
>
> (277 Books to be kept by liquidator
>
> Delivery of property to liquidator
>
> (5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is prima facie entitled.)

[47] Sections 472(1), 472(2), 475, 483, 487(3) and 511 of the Act speak about 'the property of the company', 'all the property to which the company is or appears to be entitled', 'property belonging to the company', 'recovering its property', 'assets of the company', and money, property, books and papers in his hands to which the company is prima facie entitled.'

[48] It is clear that all of these provisions could only be invoked if the lands indeed belonged to the company. In *Hor Chin Ser & Anor v Villa Genting Development Sdn Bhd (in liquidation) & Ors and other appeals* [2017] 1 MLJ 311; [2017] 5 CLJ 17, Zaleha Yusof JCA (as Her Ladyship then was) said:

> Section 236(2)(c) of the Companies Act 1965 only allows the liquidator to sell the properties of the company. The word 'belonging' as appears in s 233 clearly denotes ownership. See *Black's Law Dictionary Deluxe* (9th Ed).

[49] In *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBF Finance Bhd & Anor* [2005] 2 MLJ 201, Siti Norma Yaakob FCJ said:

> Clearly s 233(1) imposes a statutory duty on the appellant to take under his control and custody all the property and things to which KCL is or appears to be entitled. As such the appellant's right to possession is no greater than KCL's own right and is limited to possession of property or things which KCL is or appears to be entitled. See the case of *Re High Crest Motors Pty Ltd (in liq)* [1979] 3 ACLR 564 .
>
> Likewise the appellant's right to have property in the custody of the second respondent transferred to him under s 277(5) is subject to whether KCL is prima facie entitled to such property based on the same principle that the appellant's right cannot be greater than KCL's.

[50] On the vesting of property of the wound-up company in a liquidator, in *Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242, Zaleha Yusof JCA (as Her Ladyship then was) said:

The power of court to grant the vesting order upon an application by the liquidator is stipulated under s 233(2) of Act 125. Section 233(2) provides that the court may, on application of the liquidator, by order direct that ail or any part of the property whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator.

That means, the vesting order as envisaged by s 233(2), can only be made if the property in fact belongs to the company, in this case *Aik Aik Holdings*.

THE PRINCIPLE OF BENEFICIAL OWNERSHIP

[51] It is clear from the facts of this case that, at the time of the winding up petition and the winding up order, the company had been registered as the owner of the lands. However, what is also clear is that the registration of the company as the owner of the lands had been effected without the Koperasi's knowledge and without the company having paid the purchase price under the SPA in full.

[52] At the time the lands were transferred to the company, it had only paid the deposit of RM1.88m (ie 10% of the purchase price). It was only later on that it made two more payments of RM1m each payment. Even then, the total amount it has paid is only RM3.88, which I have said earlier is only approximately 20.63% of the purchase price.

[53] From the authorities of our highest courts, the law is very clear that, in the sale and purchase of land, beneficial ownership of the land only passes from the owner as vendor to the purchaser upon payment of the full purchase price. It is only then that the vendor holds the land on trust for the purchaser and the purchaser is entitled to be registered as owner and to specific performance of the sale and purchase agreement.

[54] In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johor & Ors* [1974] 2 MLJ 45, Ong Hock Sim FJ said:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.

[55] In *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, Edgar Joseph JR FCJ said:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, tirneousiy paid and when the vendor has given the purchaser a duly

executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

In our view, it is not a correct description of the relationship between the parties to a contract of sale and purchase of land to say, as did the High Court at Shah Alam in *Ahmad bin Salleh*, that from the time a contract of sale and purchase of land is concluded, the vendor is a trustee for the purchaser. At that stage, they are only parties to a contract of sale and purchase of which a court may, in certain circumstances, decree specific performance.

[56] In *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408, Wan Yahya SCJ said:

It must be appreciated that in a transaction of sale of land under our Torrens system, the estate and interest in the land remain with the registered proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee.

According to our local authorities, the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it in the purchaser at the time when the purchase money has been paid in full. See *Karuppiah Chettiar v Subramaniam; and Temenggong Securities Ltd & Ors v Registrar of Titles, Johore & Ors*.

[57] In *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23, Arifin Zakaria CJ spoke at length about the principle of beneficial ownership. He said:

We will begin with an elucidation of the principle of beneficial ownership which we think is crucial to this case. This principle of beneficial ownership was alluded to by Edgar Joseph JR in *Borneo Housing Mortgage Finance Bhd* where he observed:

> ... the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then the vendor divest himself of his interest in the land.

According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him or her with ail the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner This is clearly demonstrated by the case of *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408; [1994] 2 AMR 1220, where the Supreme Court held that:

> ... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.

(see also *M&J Frozen Food Sdn Bhd and Peninsular Land Development Sdn Bhd v*

Ahmad [1970] 1 MLJ 149).

The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property, The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.

On the other hand, a purchaser who has not settled the full purchase price does not enjoy such benefit The right of such purchaser is contractual in nature and in personam. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right in personam.

In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

[58] In a nutshell, even though the lands were transferred from the Koperasi to the company, the beneficial interest in the lands did not pass. In fact, it never has. Since the Koperasi's beneficial interest in the lands never passed to the company, the lands did not belong to the company.

[59] Since the beneficial interest in the lands at all times remained with the Koperasi, it was not a disposal. In *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169, Zainun Ali JCA (later FCJ) said of the term 'disposal':

In this regard, statutory interpretation of the word 'disposal' can be seen in the authority of *Re Margart Pty Hamilton v Westpac Banking Corp & Another* [1985] BCLC 314, where the NSW Supreme Court found that in legal terms, the word 'disposition' when used with reference to property normally connotes a change in the beneficial ownership of an asset by transfer or other type of dealing. Thus, it is clear that it would only be considered a 'disposal' if there was in fact a transfer of or change in beneficial ownership.

It is interesting to note that Australian Courts have consistently held that the term 'disposition' should be construed as 'transfer' or 'alienate', whereby there must be some change that takes out of the company or transfers beneficial ownership in a corporate asset and passes it to someone else (see *Australian Trade Commission v Film Funding and Management Pty Ltd* (1989) 87 ALR 49 and *Re Loteka Ltd* (1989) 15

ACLR 620. The Australian cases are persuasive in assisting us in determining this issue.

THE ORDERS

[60] As I said earlier, by the first order, the company was to pay the balance of the balance purchase price of RM15.92m within 60 days of the first order, failing which the lands were to be re-transferred/vested back to the Koperasi.

[61] The first order was recorded by consent between the Koperasi and the company. That made it a contract between the parties.

[62] In *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Kum Kum Chum & Ors* [1981] 2 MLJ 145, Almarhum Raja Azlan CJ succinctly said:

> ... an order by consent is evidence of the contract between the parties and is binding on all the parties to the order.

[63] In *Lee Heng Moy & Ors v Pacific Trustees Bhd & Ors* [2016] MLJU 1672; [2016] 6 CLJ 368, Mary Lim JCA (as Her Ladyship then was) said:

> We fully agree with that reasoning. It is fairly settled and trite law that an order of the court reached by consent of the parties involved is in effect a contract between those parties — see *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145. Such a consent order must therefore be given its full contractual effect — see *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465. Such an order remains valid, effective and binding on all the parties involved until and unless the order is set aside for some vitiating reason — see the Federal Court's decision in *Long Lee Hwa & Anor v Chin Ah Kwi* [1971] 2 MLJ 75. In fact, until that happens, until and unless the consent order is set aside, the consent order operates as an estoppel disallowing the defendants today from departing from its terms.

[64] The company's EOT application also signifies that the company regarded the first order as a consent agreement; therein it refereed to the first order as 'Perjanjian Persetujuan bertarikh 26 Februari 2019'.

[65] As I said earlier, the second order essentially extended the time for payment by the company of the balance of RM14.92m to 27 August 2019 but without removing, superseding or amending the terms of the first order.

[66] The first order was made before the winding up petition and the winding up order. Thus, as the company is bound by the consent order, so is the liquidator.

[67] In the liquidator's application, the liquidator did not apply to set aside the first order or directly challenge its validity. It is trite law that the first order is valid and enforceable until it is set aside. There is substance to the Koperasi's contention that the liquidator's application is an attempt to circumvent it.

[68] Ultimately, as the transfer/vesting of the lands back into the Koperasi's name was pursuant to the terms of the first order, it was not a disposition of the company's property.

THE COMPANY'S TITLE TO THE LAND WAS DEFEASIBLE

[69] Even though from 5 January 2016 to 8 October 2019 the company was registered as the owner of the lands, its title was at all times defeasible. By having failed to pay the purchase price under the SPA — in fact, having paid only the deposit when the transfer was effected — the company was never supposed to have been registered as owner of the lands. That registration was contrary to the express terms of the SPA.

[70] Under s 340(2)(a) and (b) of the National Land Code, the title or interest of any person for the time being registered as the proprietor of land shall not be defeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where the registration was obtained by forgery, or by means of an insufficient or void instrument.

[71] In this case, the party who was surely involved in effecting the transfer of the lands from the Koperasi to the company and the registration of MBSB's charge on 5 January 2016 was Messrs Param Sundaram. It had in its possession the memorandum of transfer and the title documents to the land, and was acting for the company, in whose favour the land was transferred, and MBSB in whose favour the MBSB charge was registered. The evidence shows that the title documents to the land were in its possession from around April 2015 until 12 February 2020, when Messrs Param Sundaram released the title documents to the Land to Messrs Nor Affiza & Co.

[72] I would further say that it is highly reasonable to assume that the company's directors and contributories were involved in that transfer since Messrs Param Sundaram would have been taking instructions from them and the company had everything to gain from the transfer of the lands to the company and the release of the MBSB loans.

[73] To the court's chagrin, neither the company's contributory's nor Messrs Param Sundaram disclosed who decided that the transfer of the lands from the Koperasi to the company would be effected

against the express terms of the SPA and at the time when the company had only paid the deposit. From their affidavits, it appears that the transfer of the lands was effected upon the payment of stamp duty on the transfer.

[74] Tang Ser Tiaw, a director and contributory of the company deposed as follows in paras 7–9 of his affidavit:

> 7. At the time of the purchase of the said land, the company had difficulties in raising money to pay the requisite Stamp Duty for the transfer of the said land transaction which amounted in the region of RM1,020,180.00.
>
> 8. I hereby aver that my brother Tang Ser Chiew (Dato Patrick), was a personal friend of Param Sundram and Dato Patrick went into discussions with Param Sundram who informed him that his wife, Lee Mei Kim, would be able to give Stylish Houz a loan for the said Stamp Duty sum provided that:
>
> (a) Interest is paid at 5% per month; and
>
> (b) subject to Dato Patrick signing a personal Sale & Purchase Agreement for his personal houses (in lieu of a Money Lending Agreement) which my brother did.
>
> (c) The original grant for the property is given to Param Sundram/Messrs Param Sundram to hold and safekeep until full and final payment of the loan amount
>
> 9. I hereby aver that upon the full payment of the stamp duty the land was duly transferred to the company

[75] Parameswaran a/l Sivapatha Sundram of Messrs Param Sundaram confirmed in his affidavit that, at the time of the transfer, the company had only paid the deposit He further said in paras 4.2, 4.3, and 24–26 of his affidavit:

> 4.2 With regard to paragraph 8, the purchase price was subsequently varied by the parties to the contract for a final reduced price of RM18.8 million only.
>
> 4.3 In reference to paragraph 9, the respondent had only paid deposit up to RM1.88 million as at the date of the registration of the transfer and charge, and not the full purchase price.
>
> 24. I hereby have no objection on paragraphs 1 until 7 in the respondent's Contributory Affidavit.
>
> 25. Paragraph 8(a), (b), and (c) of the respondent's Contributory Affidavit is denied. I respectfully avert that:-
>
> 25.1 In order to raise funds to pay the requisite Stamp Duty of RM 1,020,180.00, 2 Sale and Purchase Agreements dated 31/12/2015 to sell the following properties was entered —

A (i) A Double Storey house held under title GRN 124371, Lot 2022 Pekan Buki Kepayang, Daerah Seremban ('Kepayang ProperO') for the purchase price of RM287,000.00, entered between Tang Ser Chiew and his wife, Lim Yar Ting with Lee Mei Kim.

B (ii) A Double Storey semi detached house held under title H.S.(D) 191355 PT 32719 Mukim Labu, Daerah Seremban ('Labu Property') for the purchase price of RM680,340.00 was entered by Tang Ser Chiew only with Lee Mei Kim.

25.2 As the total selling price of the 2 above is not sufficient to cover the full amount C of the requisite Stamp Duty to be paid, Lee Mei Kim had agreed to give RM99,840.00 only as friendly loan to Tang Ser Chiew.

25.3 Lee Mei Kim holds the post of Finance Manager of the Firm and I deny the allegation that she is my wife and put the respondent to stict proof of such.

(Now, produced and shown to me are copies of the Sale and Purchase Agreement of D the moproperties, marked and annexed hereto as exhibit 'PS-3)

[76] Whatever the truth may be on the stamp duty and in any event, the transfer of the lands from the Koperasi to the company was fraudulent and dishonest. At the time of that transfer, both the company and Messrs Param E Sundaram would have known that the MBSB loans had been cancelled, and that the transfer and MBSB's charge could not have been validly registered. It is no wonder that MBSB had readily recorded the Koperasi-MBSB consent order to cancel MBSB's charge over the lands. Had this case been about the Koperasi seeking the return of the lands still registered in the company's name, F it would have been an easy decision to make.

[77] Because of that, I find it incredulous that Tang Ser Tiaw, a director and contributory of the company, took the position that the lands belonged to the G company. That was a very self-serving avaricious and unconscionable stand.

[78] On the authority of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, I would further hold that the transfer of the lands from the Koperasi to the company in 2016 was also under a void instrument. H

[79] In that case, the Majlis Perbandaran Manjung ('MPM') was the registered proprietor of a land in Sitiawan Perak that was being developed with a company called Bersatu Maju Properties Sdn Bhd ('the developer') into a I mixed-development. Several parties purchased lots in the proposed development, and the bank had given them loans to assist them in doing so. As the separate individual titles to the lots had yet to be issued, those purchasers assigned their rights, title and interest in their respective lots to the bank, and the bank disbursed the loan sums in full to the developer.

[80] When the separate individual titles to the lots were later issued, MPM and the developer did not inform the bank. Instead, they sold the same lots to the appellants, and the lots were registered in their names. When the bank and the original purchasers of the lots sought to recover the lands, the appellants contended that their title to the lots was indefeasible.

[81] The Federal Court found for the original purchasers and the bank. Ramly Ali FCJ said:

> In the present case, as we have shown earlier the undisputed facts of the case clearly show that the sale and purchase agreements as well as the deeds of assignment with the earlier purchasers are valid and enforceable; and the subsequent sale and purchase agreements with the new purchasers (including the appellant) are void ab initio and of no effect. It follows that their related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a void instrument.

[82] *Samuel Naik*'s case was followed by the Court of Appeal in *Hor Chin Ser & Anor v Villa Genting Development Sdn Bhd (in liquidation) & Ors and other appeals* [2017] 1 MLJ 311; [2017] 5 CLJ 17.

[83] By reason of the above, I would hold that the lands were not the property of the company, were not property to which the company is or appears to be entitled, were not property belonging to the company or assets of the company. Accordingly, ss 472(1), 472(2), 475, 483, 487(3) and 511 of the Act did not apply.

[84] By the same token, I categorically reject the liquidator's contention that the lands had been unlawfully, wrongfully and fraudulently transferred from the company to the Koperasi, and that transfer should be set aside/reversed. The fraud was in the company transferring the lands to itself in the first place.

[85] In *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313, Zulkefli CJ said:

> With respect we could not agree with the above contention of the respondent It is true that ordinarily since the respondent company had been wound up on 24 August 2000, a disposition of the company's property after the commencement of the winding up, which was on 31 May 2000 (filing of the petition) would be void. However based on the peculiar set of facts of the case, it is our considered view that the proviso in s 223 of the Act is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid.
>
> It is to be noted that s 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time. We are in agreement with the

submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. It is also noted that the Act does not prescribe as to how the discretion under s 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations:

(a) if the transaction(s) are beneficial to the general body of creditors; or

(b) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.

The general rule in s 223 *of the Act is that it does not shut out bona fide transactions.* In *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Seah SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* which states:

> that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of the discretion is an unfettered one.

[86] Based on that case, I declare that the transfer/vesting of the lands in the Koperasi pursuant to the first order is valid.

UNJUST ENRICHMENT

[87] In my mind, to decide otherwise ie that the lands were the property of the company, would be wholly unjust and an unjust enrichment. The company had only paid the deposit (10%) when the transfer was effected, and then only paid a further 10.3% of the purchase price. Why should it have the benefit of the entire lands?

[88] That is also why I regard with a certain degree of incredulity the liquidator's contention that the Koperasi is in reality an unsecured creditor of the company whose claim was for the balance under the SPA, and whose remedy was to file a proof of debt for that balance and have the balance settled in the liquidation of the company alongside of all the company's other secured and unsecured creditors.

[89] By approving the MBSB loans of RM92.4m that were to be secured by MBSB's charges over the lands, MBSB clearly believed that the lands were worth more than that. Why should the company have those lands to pay off its creditors? It has no right to them.

[90] Consequently, I agree with the Koperasi that to hold that the lands were the company's property would result in the company being unjustly enriched at the Koperasi's expense.

A PARTING WORD TO THE LIQUIDATOR

[91] In *Angutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242, Angkutera entered into an agreement with Aik Aik Holdings Sdn Bhd ('Aik'), and Fenghua Development Sdn Bhd ('Fenghua') to purchase the rooftop and the basement of a building known as Kompleks Aik Hua. Aik was subsequently wound up and the liquidator then took possession of the cineplex constructed on the rooftop of Kompleks Aik Hua and sold it to the first respondent ('Jurimba'). Angkutera then brought an action to recover the cineplex. The evidence showed that the land on which Kompleks Aik Hua was built belonged not to Aik but to Fenghua. Consequently, the building was not the second respondent's property. Zaleha Yusof JCA (as Her Ladyship then was) said of the liquidator, in paras [37] and [40] of the judgment:

> Under s 237(3) of Act 125, the liquidator may apply to the court for directions in relation to any particular matter arising under the winding up. We feel any reasonable and prudent liquidator would take this step, to refer to the court, when facing with this type of situation. Interestingly we note that the High Court in another order dated 31 October 2013, after the vesting order, found the appellant herein to be the legal and beneficial owner of another unit at Aik Aik Complex namely Unit No A1-11. Crucially that order was made pursuant to an applications for direction filed by the liquidator. The reason given by the liquidator as to why the application was made was that there were partial documents received from the appellant but in this instant case, there was no proof of ownership. We were perplexed by this reason! It is as though no documents shown to the liquidator when in actual fact the appellant had, as stated above, given the liquidator a certified copy of the sale and purchase agreement dated 27 July 1991; a certified copy of the deed of agreement cum loan agreement dated 4 September 1991 and a certified copy of the receipt and reassignment dated 7 March 2005. On top, the appellant was in occupation of the unit in dispute. So, was there not enough reason to get the court's direction as well?
>
> In conclusion, we were of the view that it was untenable for the liquidator to claim that he filed the application to obtain the said vesting order based on information within his knowledge at that point of time and surrounding circumstances; when all that he did was to write only one single letter to the official receiver. He could also not rely on the advertisement on the newspaper, when on his part, it was evidenced that no thorough investigation was done when Act 125 confers on a liquidator enough powers to gather relevant information. It was therefore our considered view that the liquidator had acted utterly unreasonably and that he had failed to take into considerations which he ought to have taken into account.'

[92] I would echo those sentiments in *Angkutera* against the liquidator here. To his affidavit in support of the liquidator's application, he exhibited the SPA,

A the first order and the second order. Thus, he would have known from these documents alone of the fact that the company had not paid the Koperasi in full for the lands, and of the agreement between the company and the Koperasi under the first order — which was even before the winding up petition — and under the second order for the company to pay the balance first by 26 April
B 2019 and then by 27 August 2019 failing which the lands would be transferred/vested back in the Koperasi. He would have known that the lands did not rightfully belong to the company. Yet he chose to claim the lands for the company and then accuse the Koperasi, the rightful owner of the lands, of unlawfully, wrongfully and fraudulently transferring the lands to itself. That
C does not stand up to good reason and proper judgment expected of a liquidator.

[93] It bears remembering that a liquidator is first and foremost an officer of the court. See r 63 of the Companies Winding Up Rules 1972 and *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713. He also had to
D obtain a 'Kelulusan' from no less than the Minister of Finance, Malaysia, to be so appointed. He is under a duty to act in a fair, impartial and even-handed manner. See *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709.

E

[94] While I can find no fault in the liquidator lodging the private caveat over the lands to preserve them while making enquiries and appraising himself of the circumstances surrounding their transfer from the company to the Koperasi, the facts of this case show that, once having done so he should have
F exercised more circumspection, before dragging the company through this entire exercise.

[95] Further, after being apprised of the facts that I have set out in detail above by the Koperasi, Messrs Param Sundaram and Messrs Nor Affiza & Co,
G he should have recognized where the fraud actually lay, and he could have re-considered the company's position vis a vis the lands and reconsidered the liquidators application. Instead, he proceeded with it full throttle.

H **[96]** To borrow the words of the Court of Appeal's judgment in the *Angkutera*'s case, 'the liquidator had acted utterly unreasonably and that he had failed to take into considerations which he ought to have taken into account'.

CONCLUSION

I

[97] It is for these reasons that I dismissed the liquidator's application with costs.

Application dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh